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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

IN THE MATTER OF:

DAYTON POWER & LIGHT  
COMPANY  
1065 WOODMAN DRIVE  
DAYTON, OHIO, 45432

Respondent.

Proceeding to Assess a Class II Civil  
Penalty Under Section 309(g) of the  
Clean Water Act, 33 U.S.C. § 1319(g)

Docket No. CWA-05-2013-0016

CONSENT AGREEMENT AND FINAL ORDER

JURISDICTIONAL ALLEGATIONS

1. This is an administrative action commenced and concluded under section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g), and sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the Consolidated Rules) as codified at 40 C.F.R. part 22, for violations of section 301(a) of the CWA, 33 U.S.C. § 1311(a).
2. According to 40 C.F.R. § 22.13(b), where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO).
3. Complainant is, by lawful delegation, the Director of the Water Division, U.S. Environmental Protection Agency (U.S. EPA), Region 5.
4. Respondent is the Dayton Power & Light Company, 1065 Woodman Drive, Dayton, Ohio, an electric utility company. Respondent is a "person" as that term is defined at section 502(5) of the CWA, 33 U.S.C. § 1362(5), and 40 C.F.R. § 501.2.
5. The parties agree that settling this action without the filing of a complaint or the

adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the terms of this CAFO, including the assessment of the civil penalty specified below.

#### **JURISDICTION AND WAIVER OF RIGHT TO HEARING**

7. Respondent stipulates that U.S. EPA has jurisdiction over the subject matter of this CAFO and waives any jurisdictional objections it may have.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

9. By executing this CAFO, the Respondent does not admit liability or admit Complainant's factual allegations set forth in this CAFO. The Respondent's execution of this CAFO does not constitute a waiver or admission of any kind, including without limitation a waiver of any defense, legal or equitable, which Respondent may have in this or any other administrative or judicial proceeding, other than a proceeding to enforce this CAFO.

#### **STATUTORY AND REGULATORY BACKGROUND**

10. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), states that: "Whenever, on the basis of any information available the Administrator finds that any person has violated [section 301 of the CWA, 33 U.S.C. § 1311], ... the Administrator ... may, after consultation with the State in which the violation occurs, assess a ... class II civil penalty under [section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B)]."

11. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), states that "Except as in compliance with [section 404 of the CWA] the discharge of any pollutant by any person shall be unlawful."

12. Section 404(a) of the CWA, 33 U.S.C. § 1344(a), states: "The Secretary [of the Army] may issue permits ... for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

13. Section 502(12)(A) of the CWA, 33 U.S.C. § 1362(12)(A), defines a "discharge of pollutants" as " ... any addition of any pollutant to navigable waters from any point source."

14. Section 502(14) of the CWA, 33 U.S.C. § 1362(14), defines "point source" as " ... any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, ... [or] discrete fissure... from which pollutants are or may be discharged."

15. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines "pollutant" as " ... dredged spoil, solid waste, ... biological materials, ... rock, sand [or] agricultural waste discharged into water."

16. Section 502(7) of the CWA, 33 U.S.C. § 1362(7), defines "navigable waters" as " ... the waters of the United States ... ."

17. Federal regulations, at 40 C.F.R. § 232.2, define the term "waters of the United States" to include rivers, streams and "wetlands."

18. Federal regulations, at 40 C.F.R. § 230.3(t), define "wetlands" as " ... those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

19. The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, and its implementing regulations at 40 C.F.R. part 19, increased the statutory maximum penalty under

section 309(g)(3) of the CWA, 42 U.S.C. § 1319(g)(3), for violations occurring after January 12, 2009, from \$10,000 to \$16,000 per day of violation and from a \$125,000 to a \$177,500 maximum penalty.

20. Respondent is an electric utility company in the State of Ohio which owns and operates the J.M. Stuart Power Station. The Respondent, through the activities of its agents, performed tree and land clearing activities to prepare for the construction of a 245 acre residual waste landfill for long term management of gypsum and fly and bottom ash generated from a flue gas desulfurization system at the J.M. Stuart Power Station.

21. Carter Hollow is a tributary of Elk Run, which is tributary to the Ohio River, which is a traditional navigable water.

22. Carter Hollow, and its unnamed tributaries, are "waters of the United States" pursuant to 40 C.F.R. § 232.2.

#### **ALLEGATIONS OF LIABILITY**

23. The Respondent owns 245 acres of real property, located generally just north and east of its J.M. Stuart Power Station at 745 U.S. Route 52, Manchester, Ohio 45144, ("the Site").

24. On June 15<sup>th</sup>, 2010, the Respondent applied to the United States Army Corps of Engineers ("USACE") for a Section 404 Permit to dredge and fill waters, ("Permit"), on Site. On April 19, 2012, the USACE issued to the Respondent the Permit. The Permit authorized the Respondent to fill parts of Carter Hollow and associated streams.

25. In early 2012, and prior to the issuance of the Permit, the Respondent's activities from bulldozers, log skidders, and tree harvesting equipment resulted in the deposit of dirt, sand or rock in Carter Hollow and associated streams at the Site. EPA estimates the length of

impacted streams to be 19,193 linear feet. Respondent's bulldozers, log skidders, and tree harvesting equipment constituted "point sources" within the meaning of the definition set forth in section 502(14) of the CWA, 33 U.S.C. § 1362(14). The dirt, sand and rock constituted "pollutants" within the meaning of the definition set forth in section 502(6) of the CWA, 33 U.S.C. § 1362(6). The addition of rock, sand, and dirt into Carter Hollow and associated streams on the Site constituted a "discharge of pollutants" within the meaning of the definition set forth in section 502(12) of the CWA, 33 U.S.C. § 1362(12).

26. At no time during the activities referenced in paragraph 25 did the Respondent possess a permit from the Secretary of the Army, through the Army Corps of Engineers, under section 404(a) of the CWA, 33 U.S.C. § 1341(a), authorizing the fill activities in the streambeds at the site.

27. Respondent's deposition of rock, sand, and dirt into the streambeds at the Site constitute discharges of pollutants to the waters of the United States without an appropriate permit and consequently violate section 301(a) of the CWA, 33 U.S.C. § 1415(a).

28. Each day the Respondent's rock, sand and dirt deposits remain in place in the streambeds at the Site constitutes a separate violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

29. According to 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. part 19, the Administrator may assess a penalty not to exceed \$16,000 for each day of violation of section 301 of the CWA to a maximum of \$177,500 for these violations.

### CIVIL PENALTY

30. Based on an analysis of the factors as specified in section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), the facts of this case, Complainant has determined that an appropriate civil penalty to settle this action is \$120,000.

31. Within 30 days after the effective date of this CAFO, Respondent must pay the \$120,000 civil penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

U.S. EPA, Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

32. The check must note the case caption and the docket number of this CAFO.

33. A transmittal letter, stating Respondent's name, the case title, Respondent's complete address and the case docket number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-19J)  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Kerryann Weaver (WW-16J)  
Wetlands Enforcement Section  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

Jeffery Trevino (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604

34. This civil penalty is not deductible for federal tax purposes.

35. If Respondent does not timely pay the civil penalty, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, nonpayment penalties and the United States' enforcement expenses for the collection action. Respondent acknowledges that the validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

36. Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2). Respondent must pay the United States' enforcement expenses, including but not limited to attorneys fees and costs incurred by the United States for collection proceedings. In addition, Respondent must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue.

#### **GENERAL PROVISIONS**

37. This CAFO resolves Respondent's liability, and any liability of the Respondent's owners, parents, subsidiaries, affiliates, related corporations and entities, insurers, reinsurers, indemnitors, stockholders, officers, directors, employees, agents, servants, successors and assigns for only federal civil penalties for the violations and facts alleged in this CAFO.

38. This CAFO does not affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

39. This CAFO does not affect Respondent's responsibility to comply with the CWA or other applicable federal, state and local laws or regulations.

40 This CAFO is a "final order" for the purposes of any future enforcement action under section 309 of the CWA, 33 U.S.C. § 1319.

41. The terms of this CAFO bind Respondent and Respondent's owners, parents, subsidiaries, affiliates, related corporations and entities, insurers, reinsurers, indemnitors, stockholders, officers, directors, employees, agents, successors and assigns.

42. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

43. Each party agrees to bear its own costs and fees, including attorneys' fees, in this action.

44. This CAFO constitutes the entire agreement between the parties.

45. The effective date of this CAFO is the date it is filed with the Regional Hearing Clerk, after having been signed by the Regional Administrator and subject to the requirements of section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C).

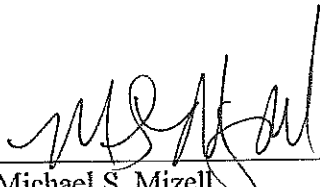
46. Complainant is providing public notice of and reasonable opportunity to comment on the proposed issuance of the CAFO according to section 309(g)(4) of the CWA, 33 U.S.C. § 1319(g)(4).



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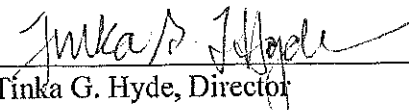
**Dayton Power & Light Company, Respondent**

7/08/2013  
Date

  
Michael S. Mizell  
Senior Vice-President and General Counsel

**U.S. Environmental Protection Agency, Complainant**

7/23/13  
Date

  
Tinka G. Hyde, Director  
Water Division

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**FINAL ORDER**

This Consent Agreement and Final Order, as agreed to by the parties, will become effective immediately upon filing with the Regional Hearing Clerk. **IT IS SO ORDERED.**

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Susan Hedman  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 5